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No. 91-2000

Supreme Court, U.S.
FILED
JUL 14 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES M. MULLIKIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the five-year statute of limitations in 28 U.S.C. 2462 applies to the administrative assessment of penalties under Section 6701 of the Internal Revenue Code, 26 U.S.C. 6701, for aiding and abetting the understatement of tax liability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 952 F.2d 920. The opinion of the district court (Pet. App. 37-50) is unreported.

JURISDICTION

The judgment of the court of appeals was filed on December 30, 1991. An order denying the petition for rehearing was entered on March 13, 1992 (Pet. App. 36). The petition for a writ of certiorari was filed on June 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1982 and 1983, petitioner prepared federal tax return forms and W-2 (Wage and Tax Statement) forms for Vanco International, Inc. (Vanco). In preparing these forms, petitioner omitted substantial amounts of cash compensation paid to Vanco employees, thereby understating Vanco's employment tax liability and its employees' income tax liabilities. The Internal Revenue Service (IRS) determined that petitioner's actions constituted aiding and abetting the understatement of tax liability within the meaning of Section 6701 of the Internal Revenue Code, 26 U.S.C. 6701. Accordingly, the IRS notified petitioner in November 1988 that it had made assessments against him under Section 6701 for the preparation of each of those forms. The aggregate amount of the penalties was $99,000. Pet. App. 4-5.

Under Section 6703(c) of the Code, a person against whom a penalty is assessed under Section 6701 may, within 30 days of notice of the assessment, pay 15% of the amount of the penalty and file a claim for refund. 26 U.S.C. 6703(c). If the refund claim is denied, or if the IRS does not act upon the claim within six months after it is filed, the person assessed may bring suit in district court for a refund of the amount paid. *Ibid.* Petitioner paid the requisite percentage of the penalties and filed administrative refund claims. The IRS denied some of the claims for refund and failed to act on the others within six months. Pet. App. 6; C.A. App. 16. Petitioner then brought this action in district court seeking a refund of the partial payments and an injunction against collection of the unpaid balance of the penalties.

2. The district court held that the five-year statute of limitations of 28 U.S.C. 2462 is applicable to penal-

ties assessed under Section 6701 and bars much of the assessment in this case (Pet. App. 39-45). 28 U.S.C. 2462 provides that

> [e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued * * *.

Because Congress did not expressly provide a limitations period for the assessment of penalties under Section 6701, the court held that the limitations period provided in 28 U.S.C. 2462 applies to such assessments (Pet. App. 44-45). The court also concluded that the five-year limitations period of 28 U.S.C. 2462 runs from the date of the act giving rise to the imposition of the penalty (Pet. App. 44-45). The court therefore held that the penalties assessed by the IRS for false returns filed more than five years prior to the date of the assessment are barred by the statute of limitations (ibid.).[1]

3. The court of appeals reversed, for "Congress did not intend that the statute of limitations contained in Section 2462 apply to the assessment of penalties

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[1] This holding did not dispose of all the penalties at issue in this case, since some of the false returns were filed less than five years prior to the date of the penalty assessments. With respect to such penalties, the district court concluded that petitioner's liability under Section 6701(b)(3) of the Code for the four false forms prepared for Vanco's 1983 employment taxes was limited to one $10,000 penalty per calendar year, rather than one $10,000 penalty per calendar quarter, as the government had maintained. The court of appeals reversed that holding (Pet. App. 25-33), and petitioner has not sought further review of that issue in this Court.

pursuant to Section 6701" (Pet. App. 19-20). The court noted that, because claims asserted by the government are not subject to a statute of limitations unless Congress has expressly so provided, statutes of limitations sought to be applied against the government are to be strictly construed in the government's favor (Pet. App. 23). While the Internal Revenue Code does not specify a period of limitations on assessment of penalties under Section 6701, Section 6502 of the Code does provide a six-year (now ten-year) statute of limitations for an action to collect the assessment once it has been made (Pet. App. 23-24). "Application of [28 U.S.C.] 2462 to Section 6701 penalties is therefore contrary to the intent of Congress" (Pet. App. 23).

Judge Boggs dissented. He concluded that 28 U.S.C. 2462 is a "catchall statute," and, since there is no express limitations period for penalty assessments under Section 6701, the five-year limitations period of 28 U.S.C. 2462 must apply (Pet. App. 34).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly held that the statute of limitations contained in 28 U.S.C. 2462 has no application to this case. By its plain language, that statute imposes no limitation on the period in which the IRS may make an administrative assessment of penalties under Section 6701 of the Internal Revenue Code. When Congress has not otherwise provided any different limitations period, 28 U.S.C. 2462 imposes a five-year period of limitations within which the United States may institute an "*action, suit or*

proceeding for the enforcement of any civil fine, penalty or forfeiture" (*ibid.* (emphasis added)). The assessment of penalties (or taxes) by the IRS is a purely administrative act that does not involve or require any judicial proceeding or action. See 26 U.S.C. 6201, 6203. An assessment is made when the appropriate administrative officer signs the summary record of assessment. See 26 C.F.R. 301.6203-1. Because the assessment of penalties or taxes by the IRS is an administrative act, the five-year limitations period provided in 28 U.S.C. 2462 on the institution by the United States of "action[s], suit[s] or proceeding[s] for the enforcement of * * * civil fine[s or] penalt[ies]" has no application to this case.[2]

We agree, of course, that 28 U.S.C. 2462 would impose a five-year period of limitations on the commencement of judicial proceedings to enforce an assessed Section 6701 penalty if Congress had not provided a *different* period of limitations for the enforcement proceedings. Cf. *United States* v. *Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985). But, in Section 6502 of the Internal Revenue Code, Congress *has* provided a different period of limitations for enforcement of Section 6701 penalty assessments. Section 6502 expressly provides a ten-year (formerly a six-year) period of limitations for the collection of such penalty assessments "by a proceeding in court" (26 U.S.C. 6502). Since Congress has provided a separate limitations period in Section 6502 of the Code for the institution of suits to enforce as-

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[2] As a general rule, 26 U.S.C. 6501(a) requires that any tax reported on a return must be assessed within three years of the date the taxpayer's return is filed. Petitioner does not dispute, however, that Section 6501 has no application to penalties imposed under Section 6701 (see *Sage* v. *United States*, 908 F.2d 18, 25 (5th Cir. 1990)).

sessed penalties or taxes, the express terms of 28 U.S.C. 2462 make that statute inapplicable to such enforcement actions.[3]

2. Petitioner errs in asserting (Pet. 14-15) that the decision in this case conflicts with the principles of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). In that case, the Court stated that, where Congress employs the phrase "except as otherwise provided" in a statute conferring jurisdiction on the federal courts, any exception to the statute must be "clear" and "affirmative" and may not be implied. *Id.* at 808. Petitioner argues that the court of appeals erroneously refused to apply 28 U.S.C. 2462 in this case because there is no "clear" and "affirmative" exception to that statute in the Internal Revenue Code. That argument, as well as petitioner's reliance on *Colorado River Water Conservation District*, is misconceived. As the court of appeals explained (Pet. App. 23):

> Section 2462, by its express terms, applies only in instances in which Congress has not otherwise provided for a statute of limitations; in the case of Section 6701 penalties, * * * Congress has otherwise provided for a statute of limitations within the Internal Revenue Code and therefore, Section 2462 has no application.

While Congress provided no statute of limitations on the administrative *assessment* of penalties under Section 6701, it did impose in Section 6502 of the Internal Revenue Code a period of limitations (previously six years but now ten years) on the com-

[3] To the extent the filing of the government's counterclaim in this case may constitute the commencement of a collection suit, it was timely under Section 6502 and petitioner does not contend otherwise.

mencement of "proceedings in court" for the collection of penalties assessed under Section 6701. See 26 U.S.C. 6502. As the court correctly concluded, 28 U.S.C. 2462 has no application to Section 6701 penalties because Congress *has* expressly provided a separate limitations period in the Internal Revenue Code for the commencement of judicial proceedings to collect assessed taxes and penalties. The decision in this case is thus entirely consistent with this Court's decision in *Colorado River Water Conservation District* v. *United States*.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1992

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[4] For the same reason, the decision in this case does not conflict with *United States* v. *Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985), on which petitioner erroneously relies (Pet. 18, 23). The timeliness of the assessment of a penalty under the Internal Revenue Code was not an issue in *Core Laboratories*. That case concerned the timeliness of judicial proceedings brought by the government to enforce civil penalties for export trade violations. See 759 F.2d at 481. It was conceded by all parties in *Core Laboratories* that 28 U.S.C. 2462 applied to the judicial proceedings involved in that case. See 759 F.2d at 481.

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